

MEMORANDUM

February 15, 2000

TO: Regional Counsels
Division Directors for EPCRA § 304/CERCLA § 103

FROM: Steven A. Herman /s/
Assistant Administrator

SUBJECT: Enforcement of EPCRA § 304/CERCLA § 103

On December 21, 1999, EPA published interim guidance in the *Federal Register* on the federally permitted release exemption to the notification requirements in section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA). This document is available in Volume 64 of the Federal Register, page 71614, and can also be found on the Internet at www.epa.gov/oeca.

The interim guidance discusses EPA's interpretation of the CERCLA and EPCRA federally permitted release exemption as applied to certain air emissions. The guidance will assist EPA regional offices, state and local emergency response and other authorities, as well as the regulated community, to determine whether or not a particular release meets the CERCLA Section 101(10)(H) definition of a federally permitted release.

Some facilities may have mistakenly believed that certain releases of hazardous substances were exempt as federally permitted releases, and therefore did not have to be reported under CERCLA or EPCRA. In order to give these facilities an opportunity to begin to report their releases, we have decided to exercise enforcement discretion not to enforce against some facilities for earlier failures to report their releases in certain circumstances. The following describes the application of this enforcement discretion:

1. Except in the situations described below, we will exercise enforcement discretion and not bring enforcement actions against sources with Clean Air Act permits for failure to report releases of hazardous substances that occurred prior to December 21, 1999.
2. Except in the situations described below, enforcement actions against sources with Clean Air Act permits for failure to report releases of hazardous substances will be a low enforcement priority until after June 21, 2000.

3. The following releases do not qualify for this enforcement discretion. In these circumstances, the facility may continue to be subject to enforcement action for failure to comply with CERCLA and EPCRA:

- a) Unanticipated releases, such as accidents;
- b) releases that were not in compliance with a permit, as described in the Environmental Appeals Board decision, In re Mobil Oil Corporation, EPCRA Appeal No. 94-2 (September 29, 1994);
- c) Releases from emergency relief valves, as described in the Administrative Law Judge decision, In re Borden Chemicals & Plastics Company, [CERCLA] EPCRA-003-1992 (Order Granting Partial Accelerated Decision Concerning Liability, February 18, 1993);
- d) Releases from sources that do not have any CAA permit.

4. EPA reserves its discretion to take action against a violator for any violation of CERCLA section 103 or EPCRA section 304, even if the violation occurred prior to December 21, 1999, when the release resulted in serious harm to surrounding areas or serious risk to human health and the environment, or reflected criminal conduct.

5. EPA will not assess any penalty against companies that choose to self-disclose under the audit policy violations which meet conditions 1 or 2 of this memorandum.

EPA is considering additional guidance recognizing that small quantities of unpermitted NO_x releases are a low enforcement priority for CERCLA and EPCRA.

During the early implementation of this policy, please ensure that your staff works closely with the staff in this office so that we develop a nationally consistent approach for handling cases in the situations described in this guidance. The regions should, therefore, notify this office and work with our staff experts whenever a litigant raises the federally permitted release exemption after a complaint is filed.

If you have any questions regarding this memorandum, please call Beth Burchard at (202) 564-4177 or Ginny Phillips at (202) 564-6139.

cc: Eric Schaeffer, ORE
Jesse Baskerville, TPED